

continuation of pay/compensation) alleging that on December 6, 2001 he sustained an emotional injury causally related to his federal employment.¹ In a statement received by the Office on February 8, 2002 appellant stated that “my illness resulted from the front desk coordinator changing the schedule to accommodate all of the female employees after consulting with the female employees and not being willing to accommodate or consult with me prior to the change.” Appellant also alleged that a supervisor, Grace Kim, spoke to him in a loud and aggressive tone and threatened to notify the chief judge if appellant would not perform front desk duties as required.

The record contains a statement dated December 20, 2001, from supervisor Kim with respect to the allegations. Another supervisor, Gary Sultz, also submitted a statement.

By decision dated March 13, 2002, the Office denied the claim on the grounds that appellant had not substantiated compensable work factors as contributing to an emotional condition. In decisions dated August 23, 2002 and September 12, 2003, the Office denied modification.

On February 5, 2002 appellant filed a Form CA-1 alleging that he sustained an emotional condition as a result of incidents occurring on January 30, 2002.² In a statement received by the Office on May 23, 2002 appellant discussed both the December 6, 2001 and January 30, 2002 incidents. Appellant stated that he suffered from genitofemoral neuropathy as a result of military service and in May 2001, he requested that he be assigned front desk duty only in the mornings, as his pain increased in the afternoons. According to appellant, the secretary in charge of scheduling had accommodated his request, but she went on maternity leave and on December 6, 2001 he was informed that he was scheduled for the afternoon shift. Appellant indicated that he became upset after speaking with supervisor Kim regarding the schedule change; he left work and did not return until the end of January 2002. Appellant stated that on January 29, 2002 he had given supervisor Sultz a form authorizing union representation at meetings with management; on January 30, 2002 he was called to a meeting in supervisor Sultz’s office, where he was denied attendance of a union representative and spoken to in an intimidating and demeaning manner regarding the union representation.

In a statement dated February 5, 2002, supervisor Kim indicated that she attended the January 30, 2002 meeting and she discussed the conversation between appellant and supervisor Sultz, who also submitted a statement regarding the January 30, 2002 meeting.

By decision dated April 12, 2002, the Office denied the claim for injury on January 30, 2002, finding that appellant had not established compensable work factors. In a decision dated September 23, 2002, an Office hearing representative affirmed the April 12, 2002 decision. Appellant requested reconsideration and by decision dated October 6, 2003, the Office denied modification.

¹ The Office File No. 102006930.

² The Office File No. 102008306.

LEGAL PRECEDENT

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition, for which he claims compensation was caused or adversely affected by factors of his federal employment.³ To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; (2) medical evidence establishing that he has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.⁴

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within the coverage of workers' compensation. These injuries occur in the course of the employment and have some kind of causal connection with it but nevertheless are not covered because they are found not to have arisen out of the employment. Disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position, or secure a promotion. On the other hand, where disability results from an employee's emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.⁵

ANALYSIS

The initial question presented is whether appellant has alleged and substantiated a compensable work factor with respect to his claim. If a compensable work factor is established, then the Board reviews the medical evidence to determine if there is probative evidence on causal relationship between a diagnosed condition and the compensable work factors.

In the present case, the Board finds that appellant has not presented evidence sufficient to establish a compensable work factor. With respect to incidents on December 6, 2001 appellant has described a situation where his work schedule had been changed on that date from morning to afternoon. The establishment of a work schedule is an administrative function of the employer.⁶ It is well established that administrative or personnel matters, although generally related to employment, are primarily administrative functions of the employer rather than duties of the employee.⁷ The Board has found that an administrative or personnel matter may be a factor of employment only where the evidence discloses error or abuse by the employing

³ *Pamela R. Rice*, 38 ECAB 838 (1987).

⁴ *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

⁵ *Lillian Cutler*, 28 ECAB 125 (1976).

⁶ *See, e.g., Peggy R. Lee*, 46 ECAB 527 (1995).

⁷ *Anne L. Livermore*, 46 ECAB 425 (1995); *Richard J. Dube*, 42 ECAB 916 (1991).

establishment.⁸ In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.⁹

To establish that a change in work schedule was a compensable work factor, therefore, appellant must show that the administrative matter was erroneous or abusive. Appellant has alleged that his preexisting genitofemoral neuropathy required him to the front desk only in the morning and he informed the employing establishment of this in May 2001. The record contains a brief report dated May 21, 2001, from Dr. Julie Rowin, a neurologist, stating that appellant had pain from his condition and may have to leave work at times. Dr. Rowin does not discuss appellant's schedule. According to Dorethea McCraney, the coworker who normally arranged the schedule, appellant had been scheduled for the mornings because he had indicated a preference for the morning desk schedule; she was not aware of any disabling condition that prevented appellant from working the afternoon schedule. The December 20, 2001 statement from supervisor Kim, indicates that the schedule change on December 6, 2001 was made to accommodate another coworker who was leaving early that day. The record, therefore, indicates that the employing establishment had attempted to accommodate appellant's request to work the morning schedule, but on December 6, 2001 another employee was leaving early and, therefore, appellant was scheduled for the afternoon. There is no evidence of error or abuse by the employing establishment in changing the work schedule.

Appellant has alleged that on December 6, 2001 supervisor Kim became confrontational and threatened to tell the chief counsel that appellant was refusing to work his assigned schedule. A compensable factor may be established if there is sufficient evidence to establish verbal abuse, although that does not imply that every statement uttered in the workplace will give rise to coverage under the Act.¹⁰ In this case, supervisor Kim reported that she told appellant that the front desk schedule was reasonable, that he could try to switch with a coworker or discuss the schedule with Laura Rodriguez. According to supervisor Kim, appellant stated that he would not work the afternoon shift and she told him he would have to submit a leave slip if he was claiming illness. The Board finds the evidence of record is not sufficient to establish that the supervisor's actions were unwarranted or that appellant was subject to verbal abuse in discussing the schedule change with supervisor Kim.

The statement from supervisor Kim also indicated that appellant claimed his schedule was changed because he was a man, while the other coworkers were women. To the extent that appellant is claiming gender discrimination, he would have to submit probative evidence sufficient to find a compensable factor based on discrimination.¹¹ In this case, appellant offered his opinion that discrimination had occurred, without providing probative evidence sufficient to support a claim based on discrimination.

⁸ See *Michael Thomas Plante*, 44 ECAB 510 (1993); *Kathleen D. Walker*, 42 ECAB 603 (1991).

⁹ *Anna C. Leanza*, 48 ECAB 115 (1996).

¹⁰ See *Carolyn S. Philpott*, 51 ECAB 175 (1999).

¹¹ Unsubstantiated allegations of discrimination are not determinative of whether discrimination occurred; a claimant must establish a factual basis for the allegations with probative and reliable evidence. *James E. Norris*, 52 ECAB 93 (2000).

The Board accordingly finds that the evidence of record is not sufficient to establish a compensable work factor based on incidents occurring on December 6, 2001.

With respect to incidents on January 30, 2002 the record also fails to establish a compensable work factor. To the extent that appellant alleges error in that he was not allowed to have a union representative with him at the January 30, 2002 meeting, there is no evidence of error by the employing establishment. A January 29, 2002 note from supervisor Sultz advises appellant that the labor management agreement provided a right to union representation at certain types of meetings, but not all meetings with a manager and appellant's right to representation would be respected when applicable. The record contains a February 15, 2002 memorandum regarding a grievance; there is, however, no evidence presented in the record with respect to findings or other probative evidence.¹² Based on the evidence of record, there is no evidence of error with respect to the lack of union representation at the January 30, 2002 meeting.

Appellant has also alleged that he was spoken to in a loud and demeaning manner at the meeting. The statement of the supervisors that attended the meeting do not support appellant's allegation. Supervisor Kim stated that she was present at the January 30, 2002 meeting and she reported that the conversation between appellant and supervisor Sultz was brief and nonconfrontational. Supervisor Sultz reported that he spoke to appellant in a firm voice, but did not scream or otherwise speak in an inappropriate manner. Appellant did not submit probative and reliable evidence establishing a compensable factor with respect to the January 30, 2002 meeting.

The Board accordingly finds that appellant has not alleged and substantiated a compensable work factor in this case. Since appellant has not established a compensable work factor, the Board will not address the medical evidence.¹³

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish an emotional condition causally related to compensable work factors.

¹² The filing of a grievance does not itself establish a factual basis for the underlying allegations. *See id.*

¹³ *See Margaret S. Krzycki*, 43 ECAB 496 (1992).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 6 and September 12, 2003 are affirmed.

Issued: March 18, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member